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JAN 30 2012

King County Prosecutor
Appellate Unit

NO. 67476-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LOGAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Joan DuBuque, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
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A. ASSIGNMENT OF ERROR

The trial court erred when it found the appellant has the current or future ability to pay legal financial obligations (LFOs).

Issue Pertaining to Assignment of Error

Did the trial court err when it found, absent an inquiry into the appellant's individual circumstances, that he has the current or future ability to pay LFOs?

B. STATEMENT OF THE CASE¹

The State charged appellant Michael Logan with first degree malicious mischief based on an incident occurring at his father's home. CP 1-4, 7, 29. Logan pled guilty. CP 8-28; 1RP 3-14.

Logan's father and sister spoke on his behalf at sentencing and urged the court not to impose a no-contact order because such orders prevented family members from providing Logan needed assistance. 2RP 4-8. Logan explained the underlying incident occurred because he was having problems with his antipsychotic medications, which he hoped to resolve with the help of jail medical staff. 2RP 8-11.

The court sentenced Logan to 14 months of incarceration and granted Logan credit for time served, which the court estimated to be 339

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 6/1/2011 and 2RP – 6/24/2011.

days. 2RP 11; CP 33. As a result of such credit, Logan would be released almost immediately. 2RP 16. The court declined to enter a no-contact order. 2RP 12.

Although there was no discussion of Logan's financial circumstances, the judgment and sentence made the following written "finding" on the preprinted form: "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 32 (Finding 4.2).

The court imposed a total of \$600 in LFOs² to be paid on a schedule established by Logan's community corrections officer or Department of Judicial Administration corrections officer.³ CP 32.

Logan appeals.

² See RCW 43.43.7541 (DNA collection fee); RCW 7.68.035 (Victim Penalty Assessment). The Court left open the possibility of restitution, but none was sought. CP 32; Supp. CP ___ (sub no. 159, Memorandum re: Restitution); RCW 9.94A.753. The court waived other LFOs. CP 32; 2RP 12-13.

³ See RCW 9.94A.760(1) (Department of Corrections or county clerk to set collection amount when not set by sentencing court).

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FOUND LOGAN HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 6097718 at *4 (Dec. 8, 2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 2011 WL 6097718 at *4 (citing Baldwin, 63 Wn. App. at 312). While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 2011 WL 6097718 at *4 (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error).

Such error may be raised for the first time on appeal. See Bertrand, 2011 WL 6097718 at *2 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's

unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (defendant may challenge an illegal sentence for the first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the court's "finding" Logan had the present or future ability to pay his LFOs. And given Logan's challenging life circumstances, as revealed at sentencing, the record suggests the opposite is true. 2RP 2-17.⁴

Accordingly, the portion of finding 4.2 quoted above was clearly erroneous and should be stricken. Bertrand, 2011 WL 6097718 at *4.⁵ Before the State can collect LFOs, moreover, there must be a properly supported, individualized judicial determination that Logan has the ability to pay. Id. at *5 n. 16.

⁴ Cf. Baldwin, 63 Wn. App. at 311 (statement in presentence report that Baldwin was employable supported this Court's conclusion that sentencing court properly considered burden of costs under RCW 10.01.160).

⁵ Logan does not challenge the imposition of these mandatory LFOs but rather the unsupported finding of present and future ability to pay.

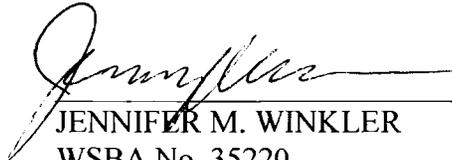
D. CONCLUSION

This Court should remand with an order that the trial court strike the unsupported finding from the judgment and sentence.

DATED this 30TH day of January, 2012.

Respectfully submitted,

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v.)	COA NO. 67476-5-1
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MICHAEL LOGAN,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF JANUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL LOGAN
3712 ISLAND ROAD
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JANUARY 2012.

x Patrick Mayovsky

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